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Supreme Court, U.S.
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No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison, Waverly, Virginia,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

*Barbara L. Hartung
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St., Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St.,
Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

Petitioner files this reply to address the single argument advanced in respondent's brief which was not anticipated and answered in the Brief for Petitioner, and to correct a pair of important inaccuracies in respondent's brief. Apart from these matters, respondent's brief fails on its face to sustain the extreme and unprecedented positions it advocates, most crucially and notably its perverse reading of § 2254(e)(2) as a strict-liability statute – a construction of AEDPA's evidentiary-hearing provision that goes beyond anything the Fourth Circuit opinion below explicitly undertook to defend, and which has been rejected by every court of appeals to have considered it. *See Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998); *Wilkins v. Bowersox*, 145 F.3d 1006, 1016 n.6 (8th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir. 1997).

I. Section 2254(e)(2) is not a strict-liability statute.

Respondent's strict-liability interpretation of § 2254(e)(2) rests entirely on the assertion that the statute must contemplate cases in which a habeas petitioner has "failed to develop the factual basis of a claim in State court proceedings" *despite* having exercised "due diligence," because the statutory text makes "due diligence" one of two conjunctive requirements for coming within the *exception* to § 2254(e)(2). Resp. Br. 15-19. Since Congress made "due diligence" an element of the exception

to § 2254(e)(2), respondent's argument goes, it could not have intended the section to be inapplicable in the first place to cases in which a petitioner had been diligent in state-court proceedings. Thus, in respondent's view, even if the lack of factual development in state court is in no way attributable to a habeas petitioner, a federal court cannot conduct an evidentiary hearing unless the petitioner satisfies § 2254(e)(2)'s very narrow exceptions.

But no English-speaking person who intended this result would use the language of § 2254(e)(2) to accomplish it. If Congress had intended to make the actions of the petitioner in the state courts completely irrelevant to the application of § 2254(e)(2), it would have written: "If the factual basis of a claim was not developed in State court proceedings, the federal court shall not hold an evidentiary hearing on the claim unless . . . ," or some similar, obvious formulation. This formulation is all the more obvious because it was in use in the pre-AEDPA case law that, according to respondent, Congress wished to reverse.[1] But Congress did not use any such language. Instead, Congress began § 2254(e)(2) with an "If" clause conspicuously featuring "the applicant" as the subject of the verb "has failed." Unless the words "the applicant" are read entirely out of the statute – in violation of the

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[1] Prior to the enactment of AEDPA, the subject now governed by § 2254(e)(2) was governed by the rule of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). As we shall see in a minute in the text, the *Keeney* opinion explicitly parsed and modified the well-known "fifth circumstance" of *Townsend v. Sain*, 372 U.S. 293 (1963). And the language of the fifth circumstance was, precisely: "the material facts were not adequately developed at the state-court hearing." *Id.* at 313.

basic, sensible rule that "[s]tatutes must be interpreted, if possible, to give each word some operative effect," *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) (citing *United States v. Menasche*, 348 U.S. 528, 538 (1955); *see also Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998)) – § 2254(e)(2) comes into play only when "the applicant" has "failed" to develop the factual basis for a claim in the state courts.

Moreover, Congress borrowed the language of the opening clause of § 2254(e)(2) directly from this Court's opinion in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), a decision which on its face and in its common understanding has never barred the federal courts from receiving evidence when facts were not developed in state-court proceedings as a result of state interference. *See* Pet. Br. 23-28; *see generally Felker v. Turpin*, (AEDPA "codifies some of the pre-existing limits on successive petitions"); *Hohn v. United States*, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (citing "the rule that statutes are deemed to adopt the extant holdings of this Court") (citation omitted). Respondent's refusal to recognize the parallel wording of *Keeney* and § 2254(e)(2) leaves it unable to read the statute coherently or with appropriate regard for context. *See, e.g., Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991). As described in detail below, when the plain language of the statute is examined against the background of *Keeney* and the familiar circumstances of pre-AEDPA collateral review proceedings, it is respondent's – not petitioner's – interpretation of § 2254(e)(2) that emerges as producing a "nonsensical conclusion," Resp. Br. 17.

Both before and since the enactment of AEDPA, there have been at least four recognized, prototypical situations in which a federal habeas claim is advanced on the basis of evidence that was not developed in state court: (1) cases of interference by state officials, *see Amadeo v. Zant*, 486 U.S. 214, 222 (1988); (2) cases in which "the factual or legal basis for a claim was not available to [the petitioner or] counsel," *see Murray v. Carrier*, 477 U.S. 478, 488 (1986), *citing Reed v. Ross*, 468 U.S. 1, 16 (1984); (3) cases of attorney *error* (the situation in *Murray* itself and in *Coleman v. Thompson*, 501 U.S. 722 (1991)), and (4) cases of attorney *incompetence* (which is distinguished from mere attorney error in *Murray*[2] and again in *Coleman*[3]). These situations had not been explicitly distinguished at the time of *Townsend v. Sain*, 372 U.S. 293 (1963), but were well demarked in the case law by the time this Court decided *Keeney* thirty years later.

Keeney explicitly modified the so-called "fifth circumstance" of *Townsend*, which prescribed that a federal habeas petitioner would be given an evidentiary hearing in federal district court if "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313. *Keeney* replaced this rule with one holding

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[2] *See Murray*, 477 U.S. at 488: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington* . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. . . . ¶ Ineffective assistance of counsel, [however,] . . . is cause for a procedural default."

[3] *See Coleman*, 501 U.S. at 752-753, quoting with approval the passage from *Murray* cited in note 2, *supra*.

that new evidence could *not* be received in federal habeas if the lack of factual development was the result of the petitioner's "failure to develop a material fact in state-court proceedings," 504 U.S. at 5, unless the petitioner showed "cause and prejudice." Thus, the initial evidence-preclusion rule of *Keeney* came into play if, but only if, a petitioner or petitioner's counsel *failed* to develop the facts in state court; an exception to the rule was recognized if, but only if, the failure was excused by cause-and-prejudice.

The cause-and-prejudice exception to the evidence-preclusion rule of *Keeney* was adopted *verbatim* from a line of this Court's prior case law featuring *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Sykes* case law had not undertaken to announce an exhaustive roster of circumstances constituting "cause," but had recognized at least three prototypical situations establishing "cause": (a) cases involving some interference by state officials with the development of a claim by petitioner's counsel; (b) cases in which counsel had failed to develop a claim because the factual or legal bases for it were not reasonably available, and (c) cases in which petitioner's counsel had failed to develop a claim because counsel was ineffective within the well-known standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Since situation (a) did not involve any "failure" on the part of petitioner or petitioner's counsel and would therefore not come within the *Keeney* rule in the first place, the major categories of "cause" theoretically eligible to be raised in the *Keeney* context were situations (b) and (c). As a practical matter in the wake of *Teague v. Lane*, 489 U.S. 288 (1989) – which sharply narrowed the range of cognizable claims in which

situation (b) could be demonstrated – efforts by federal habeas petitioners to show cause almost always took the form of assertions of ineffective assistance of counsel.

As described in petitioner's opening brief at pp. 26-28, AEDPA's § 2254(e)(2) followed the lead of *Keeney* in defining the circumstances that initially bring the evidence-preclusion rule into play. What § 2254(e)(2) changed was the *exceptions* to the rule. *See* Pet. Br. 25. Specifically, § 2254(e)(2) terminated the exception for "cause" – thus putting an end to ineffective assistance of counsel as a sufficient ground for exemption from the evidence-preclusion rule that § 2254(e)(2) adopted from *Keeney* – and established a narrower exception having two conjunctive elements: (a) due diligence (or a new, retroactive legal rule), and (b) innocence. As a result, § 2254(e)(2) *applies* – that is, the evidence-preclusion rule comes into play in the first place – only when a petitioner or his counsel has *failed* to develop evidence in the state courts. The ordinary situation in which the rule does *not* come into play is the state-interference situation, which is the situation presented in petitioner Michael Williams's case.

When § 2254(e)(2) *does* come into play, a petitioner can obtain an *exception* to its evidence-preclusion rule only by showing both due diligence in developing the factual bases for claims in the state courts (or a new, retroactive rule of law) and clear-and-convincing evidence of innocence. Putting aside the infrequent situation of a retroactive rule of constitutional law that can be invoked in federal habeas under *Teague*, the most common situation in which a petitioner who failed to develop evidence convincingly showing innocence in the state

courts can satisfy the "due diligence" requirement is the case hypothesized in *Strickland v. Washington* in which defense counsel makes a *reasonable* – and therefore not incompetent – professional judgment to limit investigation and thereby fortuitously fails to uncover factual information convincingly demonstrative of the petitioner's innocence. This case will be excepted from the evidence-preclusion rule of 2254(e)(2) – into which it does fall initially – under the explicit terms of subsection (e)(2)(ii) because the clear-and-convincing evidence of innocence "could not have been previously discovered through the exercise of due diligence."[4] On the other hand, cases in which the petitioner's state-court lawyer neither makes an adequate factual investigation nor "a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, likewise fall within § 2254(e)(2)'s evidence-preclusion rule (since counsel failed to develop the facts for no reason external to the defense), but will *not* come within the "due diligence" exception to the rule (since "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation," *Strickland*, 466 U.S. at 690-91).

In sum, ineffective-assistance-of-counsel cases came within the initial *rule* of *Keeney* and within its *exception*.

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[4] Another, though rarer, situation is the case in which the petitioner's lawyer conducted a thorough-going investigation but the relevant facts were undiscoverable because of fortuities for which neither the petitioner nor the state was responsible, like the absence from the country of the sole witness to those facts.

Those cases also come within the initial *rule* of § 2254(e)(2), but they do not come within the statute's exception. Cases in which attorneys made a professionally reasonable judgment not to conduct an investigation and therefore failed to develop facts in state court came within the initial *rule* of *Keeney* but not within its *exception*. Such cases now come within the initial *rule* of § 2254(e)(2); they come within its *exception* if, but only if, clear-and-convincing evidence of innocence is also shown. Another, rarer class of case that comes within the rule *and* the exception to § 2254(e)(2) involves the situation envisioned by *Murray* as quoted in footnote 5 of *Keeney*, where the factual basis for a claim revealing clear-and-convincing evidence of innocence is not available to counsel until the federal habeas stage through no fault of counsel or of any state authority. *See* note 4 *supra*.

The existence of these varying situations is why respondent's brief is wrong when it characterizes petitioner's interpretation of § 2254(e)(2) as illogical for making the "rule" of § 2254(e)(2) coextensive with the first element of its two-element exception. Respondent's entire argument hinges upon its unwarranted assertion that under petitioner's interpretation of the statute, all cases coming within the "due diligence" half of the exception would have fallen outside of § 2254(e)(2) in the first place. But this is simply incorrect: rather, under petitioner's interpretation, the ordinary case in which § 2254(e)(2) does not *apply* to evidence undeveloped in the state courts is the state-interference situation. Cases where a petitioner or counsel failed to develop evidence in the state courts without having been impeded by state interference do come within § 2254(e)(2). In such cases,

the due-diligence *exception* to § 2254(e)(2)'s evidence-preclusion rule can be met only by showing that despite the due diligence of counsel, clear-and-convincing evidence of innocence went undeveloped in the state courts.

Apart from its unfaithfulness to the plain language of § 2254(e)(2) and the historical context in which the statute was enacted, respondent's idiosyncratic interpretation would also lead to perverse results in cases implicating other provisions of AEDPA. For example, under respondent's strict-liability reading of "failed to develop," a federal district judge who determines under § 2254(b)(1)(B)[5] that a petitioner should be excused from the ordinary exhaustion requirement because state corrective process is either unavailable or ineffective, would be required to review the merits of the petitioner's claim or claims *de novo* while being deprived of the ability to ascertain the facts relevant to the issues before the court.[6]

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[5] Section 2254(b)(1)(B) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> . . . .
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant

[6] A state's express waiver of exhaustion pursuant to § 2254(b)(3) would likewise require merits review with no opportunity for fact development. *See Lockhart v. Johnson*, 104 F.3d 54, 57-58 (5th Cir. 1997), *cert. denied*, 117 S.Ct. 2518 (1997) (amended § 2254(d) is inapplicable where a claim was not presented to the state courts and the state expressly waives the exhaustion requirement in federal habeas proceedings).

See Keeney, 504 U.S. at 19-20 (O'Connor, J., dissenting) ("Federalism, comity, and finality . . . are less significantly advanced, once [federal] relitigation [of a claim] properly occurs, by permitting district courts to resolve claims based on an incomplete record"); *id.* at 24 (Kennedy, J., dissenting) ("We consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on accurate assessment of the facts").

The same would hold true of claims wrongly determined by the state courts to be procedurally barred. Such claims are not subject to the mode of review prescribed by § 2254(d) by virtue of their not having been "adjudicated on the merits in State court proceedings," *see, e.g., Weeks v. Angelone*, 176 F.3d 249, 258 (4th Cir. 1999), *aff'd*, 68 U.S.L.W. 4060 (U.S., January 19, 2000); *Moore v. Parke*, 148 F.3d 705, 708 (7th Cir. 1998); *Hernandez v. Johnson*, 108 F.3d 554, 558 (5th Cir. 1997), but under respondent's reading of the evidence-preclusion provision of § 2254(e)(2), federal courts would be forced to decide these cases without the relevant facts. Nothing in the statute remotely suggests that Congress intended such illogical, unfair and unprecedented results.

II. Inaccuracies in respondent's brief.

Respondent's brief contains numerous factual inaccuracies and misleading statements that will be apparent by comparison to the documented Statement of the Case in the Brief for Petitioner. It would trespass on the

Court's time to rehash all the facts. Petitioner therefore limits this aspect of his reply brief to two matters – one relating to his efforts to develop the evidence supporting his federal constitutional claims in state court, the other relating to the critical significance at petitioner's trial of the credibility battle between petitioner and Jeffrey Cruse.

Respondent argues that "[b]ecause the state court appointed . . . [petitioner] an attorney who clearly could have discovered the basis for the claims [involving Juror Stinnett] with the exercise of due diligence, a finding of 'cause' or 'due diligence' cannot be premised upon the state court's denial of . . . [petitioner's] conclusory request for an investigator." Resp. Br. 26. Respondent's criticism of state habeas counsel, Eric White, for not having single-handedly located and interviewed petitioner's jurors denies the reality of state habeas practice in Virginia. As noted at page 12 of petitioner's brief, the Virginia Supreme Court's denial of White's request for investigative services coincided with its denial of petitioner's application for state habeas relief. Thus, by the time White learned that he would receive no investigative assistance from the state courts, it was too late to conduct his own investigation because relief had already been denied.[7]

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[7] Nor should White be faulted for not anticipating the Virginia Supreme Court's simultaneous denial of his request for an investigator and his petition for habeas relief. In a contemporary case, the Virginia Supreme Court's denial of a request for expert services preceded its denial of habeas corpus relief by nearly five months. *See Cardwell v. Greene*, 152 F.3d 331, 335 (4th Cir. 1998) (recounting procedural history of Cardwell's

Furthermore, respondent's contention that White could easily have interviewed the jurors and presented the evidence he gathered is disingenuous. Had White done so, he would have been required to submit his own affidavit as counsel for petitioner attesting to what he had learned. In other Virginia capital habeas cases, however, Mr. Curry, counsel for the respondent in this case, has vigorously opposed the submission of affidavits by counsel for the petitioner as "manifestly improper." *Walton v. Taylor*, Record No. 990305 (Va.S.Ct.) (Warden's Opposition to Motion to Depose Dr. Ryans at 2, Sept. 20, 1999). Respondent's brief offers no explanation as to why an affidavit from White recounting the substance of his conversations with the jurors would have been any more acceptable than affidavits by counsel in other cases.

Respondent also relies heavily upon what it terms petitioner's "highly inculpatory testimony" in an effort to diffuse the prejudice petitioner suffered as a result of the Commonwealth's nondisclosure of Cruse's psychiatric report and its failure to reveal Cruse's testimonial deal with the prosecution. Resp. Br. at 37; *see also id.* at 10, 49.[8]

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case). Furthermore, like Cardwell, petitioner was among the very first death-sentenced prisoners to seek state habeas corpus relief under the Virginia scheme that became effective July 1, 1995. *See* Brief of *Amici* VCCDA & VTLA at 7, n.5.

[8] Respondent repeatedly asserts that both Cruse and petitioner testified that the initial shot fired by petitioner struck Mr. Keller in the head. *See* Resp. Br. 1, 2-3 & n.4, 10 n.8, 49. This is simply not true. While footnote 27 of petitioner's brief explains how the testimony *suggests* that the shot petitioner fired struck Mr. Keller in the head, the record is clear that neither Cruse nor petitioner actually testified that it did. What is known is that Mr. Keller was shot five times, that he stood up

As the record clearly reveals, however, petitioner admitted to firing only one shot which, in light of the undisputed circumstantial evidence, was likely the shot that passed through Mr. Keller's face. *See* Pet. Br. 41-42. While respondent and petitioner obviously disagree about whether the medical examiner's testimony should be read as indicating that the wound caused by that shot "was not likely fatal in and of itself," Resp. Br. 10, n.8 *quoting* Pet. Br. 6, respondent's treatment of the subject dodges a more basic and important point: the medical examiner's testimony *did not answer the question whether the shot petitioner admitted firing "caused the victim's death,"* JA 293 (Instruction No. 18 given to petitioner's jury). When asked "about the lethal effect of that wound not entering the brain," the medical examiner answered equivocally that "[s]ince we had other wounds you really cannot evaluate what individual damage that bullet would have done to the skull or the brain." JA 178. When pressed further by the prosecutor as to whether it would "be fair to say that [this wound] contributed to the death of Morris Keller" the medical examiner said "Yes," but subsequently revealed that, in her view, "any gunshot wound, even if it might not be lethal, in and of itself is contributory." JA 179; 181.

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after the first shot which was fired by petitioner, and that two of the five shots passed through his brain, while the other three resulted in wounds to less vital areas. It is thus possible, as discussed in petitioner's brief, that petitioner's shot struck Mr. Keller in the head, but it is also possible that this shot resulted in one of the leg wounds sustained by Mr. Keller. Either way the jury could not convict petitioner of capital murder unless it determined that the wound caused by his shot was fatal.

Contrary to respondent's suggestion, a wound determined to have been "contributory" under the medical examiner's definition of that term is simply not the equivalent of a wound that must, beyond a reasonable doubt, have "caused the victim's death." JA 293.[9] This was the central, decisive issue at trial for both the prosecution and the defense, as evidenced by both sides' focus on it in their summations.[10]

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[9] Respondent's reliance on *Strickler v. Greene*, 119 S.Ct. 1936 (1999), in this connection is misplaced. The underlying murder in *Strickler* was accomplished using a 69 pound boulder whose "weight and dimensions made it apparent that a single person could not have lifted it and dropped or thrown it while simultaneously holding the victim down." *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991). These undeniably unique facts are reflected in the Virginia Supreme Court's approval of the Commonwealth's joint-perpetrator theory in that case: "where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." *Id., quoting Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (1979), *cert. denied*, 444 U.S. 1103 (1980) (defendant who "jointly participated in [a] fatal beating" subject to prosecution for capital murder). Here, however, it would have been entirely possible for petitioner's jury to have remained unconvinced that petitioner's infliction of *a* wound was sufficient to find that he had "take[n] a direct part in inflicting fatal injuries." *Strickler*, 404 S.E.2d at 235.

[10] *See* JA 282 (the prosecutor: "The only dispute is about the rape and whether . . . [Michael Williams] is guilty of first degree murder or capital murder"); JA 280 (defense counsel: "our theory is . . . that Mr. Cruse fired all three shots that killed Mrs. Keller. . . . And . . . based upon the evidence that you see, when Mr. Keller stood up, that the wound that . . . [the medical examiner] said was possibly non-lethal . . . was the one that . . . Mr. Williams fired from the .38. . . . "); JA 280 (defense counsel: "And I submit to you that Mr. Cruse is lying. . . . ¶ Now I'm not suggesting to you that Mr. Williams is not guilty, that because of my scenario he walks, he gets off of murder. He's guilty of first degree [noncapital] murder on both counts").

The medical examiner's testimony merely highlighted the uncertainty inherent in any attempt to determine whether the wound petitioner probably inflicted was fatal. It did not render the jury's ultimate resolution of that question a foregone conclusion and it does not refute a reasonable probability that the result of petitioner's trial would have been different but for the Commonwealth's failure to disclose the evidence undermining Cruse's credibility.

CONCLUSION

For these additional reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

*Barbara L. Hartung
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St.,
Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St.,
Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*